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No. 76-312

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Customs and Patent Appeals (Pet. App. 1a) is reported at 534 F. 2d 920. The judgment order of the Customs Court (Pet. App. 2a-3a) is not officially reported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on June 3, 1976. The petition for a writ of certiorari was filed on August 31, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the President was authorized by statute to impose a limited, temporary surcharge upon imports in time of declared national emergency.

STATUTORY PROVISIONS INVOLVED

Section 350(a) of the Tariff Act of 1930, 48 Stat. 943, as amended, 19 U.S.C. 1351(a), in relevant part provides:

> (a)(1) For the purpose of expanding foreign markets for the products of the United States * * * the President * * * is authorized from time to time—
>
> (A) To enter into foreign trade agreements with foreign governments or instrumentalities thereof * * *.
>
> (B) To proclaim such modifications of existing duties * * * as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.
>
> * * * * *
>
> (6) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

Section 255(b) of the Trade Expansion Act of 1962, 76 Stat. 880, 19 U.S.C. 1885(b), in relevant part provides:

> (b) The President may at any time terminate, in whole or in part, any proclamation made under this title.

Section 5(b) of the Trading with the Enemy Act, 40 Stat. 415, as amended, 50 U.S.C. App. 5(b), in relevant part provides:

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, * * * by means of instructions, licenses, or otherwise—
>
> * * * * *
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest * * *.

STATEMENT

In 1971, the United States experienced an economic crisis of both domestic and international dimensions. As part of an attempt to meet this crisis, the President, on August 15, 1971, issued Proclamation 4074, 3 C.F.R. 80 (1971 Comp.) (Pet. App. 101a-105a).

In Proclamation 4074, the President noted that there had been a prolonged decline in the monetary reserves of the United States, that the trade and international competitive position of the United States was threatened, and that the nation's unfavorable balance of payments required the imposition of a surcharge upon imports. Accordingly, the President, relying upon his authority under the Constitution and

various statutes, "including, but not limited to" the Tariff Act of 1930, as amended, 19 U.S.C. 1351(a), and the Trade Expansion Act of 1962, 19 U.S.C. 1885(b), declared a national emergency and proclaimed a surcharge upon all "dutiable" articles imported into the United States that had been the subject of prior tariff concessions.[1] The surcharge was established at the rate of 10% with the proviso that if an additional duty of 10% ad valorem would cause the duty or charge payable on an article to exceed the amount of duty established by statute, the statutory rate would apply (Pet. App. 102a-103a).[2]

The surcharge imposed by Proclamation 4074 was terminated by Proclamation 4098, 3 C.F.R. 116 (1971 Comp.), on December 20, 1971 (Pet. App. 105a-107a).

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[1] Since the surcharge was limited to dutiable articles, no duties were imposed upon goods that were statutorily entitled to free entry (Pet. App. 26a). If an article had not been the subject of a prior trade concession, the statutorily prescribed rate remained unaffected (*ibid.*).

[2] The rates of duty upon imported merchandise are set forth in the Tariff Schedules of the United States. Generally, the rates are set forth in two columns. Column 2 contains the statutory rates of duty. See 19 U.S.C. 1202(9)(d). Column 1 contains the rates of duty proclaimed by the President in order to implement international agreements (see 19 U.S.C. 1202(4)(b)), as authorized by such statutes as the Tariff Act of 1930, 19 U.S.C. 1351(a), or the Trade Expansion Act of 1962, 76 Stat. 872, 19 U.S.C. 1821. Proclamation 4074, by providing that the imposition of the surcharge could not increase the duty payable above that contained in Column 2 (Pet. App. 102a-103a), in effect provided that the imposition of the surcharge could not increase the rate of duty beyond that established by statute.

Petitioner, an importer of aluminum products, filed a protest with the appropriate customs officials when the Proclamation 4074 surcharge was imposed upon certain aluminum ingot it had imported from Canada. Upon denial of this protest, petitioner commenced this civil action in the Customs Court pursuant to 28 U.S.C. 1582.

The United States moved for summary judgment upon the basis of the decision of the Court of Customs and Patent Appeals in *United States* v. *Yoshida International, Inc.*, 526 F. 2d 560 (Pet. App. 4a-39a). Petitioner stated that it disagreed with the decision in that case but acknowledged that the decision controlled this case; the motion of the United States was granted (Pet. App. 2a-3a).

The Court of Customs and Patent Appeals affirmed the judgment of the Customs Court (Pet. App. 1a). The court held that while the parties and the goods differed from those involved in *United States* v. *Yoshida International, Inc.*, *supra*, the controlling facts and applicable law presented in that case were the same as those presented here and that, therefore, the decision in *Yoshida* controlled the decision in this case.

In *Yoshida*, the court, after rejecting the government's contention that Proclamation 4074 was authorized by the Tariff Act of 1930, 19 U.S.C. 1351(a)(6), and the Trade Expansion Act of 1962, 19 U.S.C. 1885(b), held that Section 5(b) of the Trading with the Enemy Act authorized the President to issue Proclamation 4074. According to the court, Section 5(b) authorized the President in time of declared

national emergency to regulate, "by means of instructions, licenses, or otherwise," the importation of "any" property in which "any" foreign country or foreign national possessed an interest.

The court found no indication in the legislative history that the Congress intended to prohibit the use of surcharges to implement the statute or to limit the application of the statute to property possessing an "enemy-taint." In addition, since, in the court's view, the statute contained an intelligible standard, there was no need to interpret the statute narrowly so as to preclude the use of surcharges in order to avoid the possibility that the statute contained an unconstitutional delegation of authority. Finally, the court reviewed the limited and temporary nature of the surcharge imposed by Proclamation 4074 and held that the surcharge that the President had imposed constituted a reasonable exercise of the authority conferred by Section 5(b).

ARGUMENT

In view of the enactment of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978, which specifically directs and authorizes the President to impose temporary import surcharges "[w]henever fundamental international payments problems require," the decision below is of no continuing substantial importance. Section 122(a), 19 U.S.C. (Supp. V) 2132(a). Moreover, the Court of Customs and Patent Appeals correctly held that Section 5(b) of the Trading with the Enemy Act authorized the limited and temporary

surcharge imposed by Presidential Proclamation 4074 and was not an unconstitutional delegation of legislative authority. In addition, contrary to the view of the court, the surcharge also was authorized by the Tariff Act of 1930 and the Trade Expansion Act of 1962. Accordingly, review by this Court is not warranted.

1. Presidential Proclamation 4074 imposed a limited surcharge upon certain imports in order to meet a national emergency caused by a decline in the international monetary reserves of the United States and an adverse balance of payments (Pet. App. 101a-102a).

Subsequent to the decision of the Court of Customs and Patent Appeals in *United States* v. *Yoshida International, Inc.*, 526 F. 2d 560, Congress enacted the Trade Act of 1974. Section 122 of that Act specifically authorizes and directs the President, by proclamation, to impose temporary import surcharges and temporary limitations upon imports through quotas when international monetary difficulties so require. 19 U.S.C. (Supp. V) 2132. Since Congress has now enacted a specific provision authorizing the President to impose an import surcharge of the very type imposed by Proclamation 4074, the decision of the court below that the President was authorized to promulgate Proclamation 4074 by Section 5(b) of the Trading with the Enemy Act has little if any prospective significance.[3]

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[3] Moreover, while Section 122(h) of the Trade Act of 1974 gave the President specific authority to impose import surcharges in situations of international balance-of-pay-

2. Petitioner contends, first, that Section 5(b) of the Trading with the Enemy Act did not authorize the limited and temporary import surcharge imposed by Proclamation 4074 and, second, that if it did, the authorization was an unconstitutional delegation of legislative authority. The Court of Customs and Patent Appeals properly rejected both contentions.

Section 5(b) provides in pertinent part that "during any * * * period of national emergency declared by the President, the President may * * * by means of instructions, licenses, or otherwise * * * regulate * * * [the] importation * * * of * * * any property in which any foreign country or a national thereof has any interest." By its clear terms, the statute authorized the President to issue a proclamation, such as Proclamation 4074, declaring a national emergency and imposing a surcharge "to regulate the importation" of property in which any foreign country or foreign national possessed any interest.

There is no merit to petitioner's contention that the authority to regulate imports "by means of instructions, licenses, or otherwise" does not include the authority to regulate imports by means of import surcharges. This Court recently rejected a similar contention in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, No. 75-382, decided June 17, 1976.

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ments problems, Congress at the same time withdrew the President's authority to impose import surcharges under any other provision of law authorizing the termination of tariff concessions. 19 U.S.C. (Supp. V) 2132(h). Therefore, any issue with respect to the President's authority to issue Proclamation 4074 under the Tariff Act of 1930 and the Trade Expansion Act of 1962 also is of no continuing importance.

There it was contended that the President's authority under Section 127(d), 19 U.S.C. (Supp. V) 1862(b) to "take such action, and for such time, as he deems necessary to adjust the imports of [an] article * * * so that such imports will not threaten to impair the national security * * *" did not include the authority to impose a system of monetary exactions in the form of license fees. In rejecting that contention, the Court stated (slip op. 12):

> [T]he language of [the statute] seems clearly to grant [the President] a measure of discretion in determining the method to be used to adjust imports. We find no support in the language of the statute for respondents' contention that the authorization to the President to "adjust" imports should be read to encompass only quantitative methods—*i.e.*, quotas—as opposed to monetary methods—*i.e.*, license fees—of effecting such adjustments.

Section 5(b) of the Trading with the Enemy Act affords the President similar discretion in selecting methods of regulating imports in times of national emergency. Indeed, Congress in that statute expressly declined to limit the methods available to the President when it provided that he could exercise his powers "by means of instructions, licenses, *or otherwise*" (emphasis supplied).[4]

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[4] The "license fee" system upheld in *Federal Energy Administration* v. *Algonquin SNG, Inc., supra*, is functionally equivalent to the import surcharges imposed by Proclamation 4074, and, as the Court of Customs and Patent Appeals noted (Pet. App. 23a, n. 23), was described by the United States Tariff

Nor is there any support in the legislative history of Section 5(b) for the proposition that in providing that the President could regulate imports by means of "instructions, licenses, or otherwise," Congress intended to preclude the use of an import surcharge.[5] As the Court of Customs and Patent Appeals correctly held in *Yoshida*, there is no indication in the legislative history that Congress intended the Act to be construed other than according to its terms.

Petitioner's further contention that the President's authority under Section 5(b) is limited to "enemy-

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Commission as a "duty system." Since Section 5(b) expressly refers to "licenses" as one of the means by which the President may regulate imports, petitioner's construction of that provision reduces to a contention that Proclamation 4074 is *ultra vires* because the President failed to use the appropriate label (see Pet. App. 23a, n. 23).

[5] The legislative history cited by petitioner (Pet. 11-12), which illustrates that authority to regulate imports once had existed under Section 11 of the Act, 50 U.S.C. App. 11, a provision that lapsed at the close of World War I, does not support petitioner's position. Congress amended Section 5(b) in 1941 specifically to grant to the President the authority to regulate imports. 55 Stat. 839. The fact that the authority contained in Section 11 lapsed earlier is irrelevant.

The remarks of Representative Kefauver, quoted at Pet. 12, do not demonstrate that Section 5(b) was intended to preclude the use of import surcharges to regulate imports. Representative Kefauver's understanding of what "the Treasury wanted" was clearly in reference to that portion of the 1941 amendment to Section 5(b) which permitted the President to utilize property seized under the Act. Representative Kefauver apparently overlooked the fact that elsewhere in that amendment Congress expressly added the term "importation" to the types of transactions the President was authorized to regulate in times of national emergency.

tainted" property (Pet. 12, 16-18) also is unfounded. Section 5(b) by its terms clearly and deliberately applies to "any property" of "any" foreign country or national. The language of Section 5(b) contrasts sharply, for example, with the reporting provisions of Section 7(a), 50 U.S.C. App. 7(a), which apply, *inter alia*, to persons who hold or control "property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy * * *." Had Congress intended in Section 5(b) to limit the President's authority to "enemy-tainted" property, it could easily have so provided. In any event, the legislative history of Section 5(b) is devoid of any indication that Congress intended the statute to apply other than according to its plain meaning.[6]

Petitioner's reliance on *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, is misplaced. That case concerned the right of an alien to sue under Section 9(a) of the Trading with the Enemy Act to recover property seized under the vesting power of Section 5(b); it did not involve the scope of the regulatory power involved here. In any event, as the Court of Customs and Patent Appeals noted (Pet. App. 18a, n. 17), the Court in *Uebersee Finanz-Korp.*, "did not hold that the vesting power, let alone the regulatory power, was limited to property having an enemy

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[6] The Court of Customs and Patent Appeals correctly held in *Yoshida* that the title of the statute does not restrict its scope (Pet. App. 22a, n. 22). See *Brotherhood of R.R. Trainmen* v. *Baltimore & O. R.R. Co.*, 331 U.S. 519, 528-529.

'taint.'" Indeed, this Court confirmed that "[t]he property of *all* foreign interests was placed within reach of the vesting power * * *." 332 U.S. at 485 (emphasis supplied). See also *United States* v. *Broverman*, 180 F. Supp. 631, 634-635 (S.D. N.Y.).[7]

Finally, petitioner's contention that Proclamation 4074 was beyond the scope of authority delegated in Section 5(b) and "subvert[ed] the manifest Congressional intent to maintain control over its Constitutional powers to levy tariffs" (Pet. 11) is at odds with the intent and understanding of Congress reflected in recent legislation. First, as noted above, the Trade Act of 1974 specifically authorizes the President to impose surcharges to respond to balance-of-payments problems. Second, in the National Emergencies Act, Pub. L. 94-412, 90 Stat. 1255, 50 U.S.C. 1601 (September 14, 1976), Congress responded di-

[7] Similarly, the decision of the court below that Section 5(b) is not limited to enemy-tainted property is not in "apparent conflict" (Pet. 16) with the decision of the Third Circuit in *Veterans & Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs*, 459 F. 2d 676, certiorari denied, 409 U.S. 933. There, in fact, the Third Circuit upheld the seizure of literature from North Vietnam under the authority of Section 5(b) and rejected claims that Section 5(b) was an unconstitutional delegation of legislative authority and that, as applied to literature, the authority exercised was invalid under the First Amendment. The court did not hold that Section 5(b) was limited to enemy-tainted property—an issue which, in any event, was not before the court. Moreover, the Third Circuit stated that in the absence of the First Amendment questions presented in that case, "we would have no difficulty holding that the delegation does not render the statute unconstitutional * * *." 459 F. 2d at 679-680.

rectly to concerns with respect to the President's authority to exercise extraordinary powers by declaring national emergencies. In that statute Congress placed conditions on the declaration of emergencies and provided for termination of declared emergencies. However, notwithstanding the President's recent action in Proclamation 4074 and the court's opinion in *Yoshida*, Congress expressly exempted the powers and authority under Section 5(b) of the Trading with the Enemy Act from the provisions of the National Emergencies Act. See Section 502(a)(1) of that Act, 50 U.S.C. 1651(a)(1).[8] The foregoing legislative actions further confirm that Proclamation 4074 was within the authority Congress intended to delegate in Section 5(b). See *Federal Energy Administration* v. *Algonquin SNG, Inc.*, *supra*, slip op. 21-22; *Pike* v. *United States*, 340 F. 2d 487, 488 (C.A. 9).

3. The Court of Customs and Patent Appeals correctly rejected petitioner's broad contention that, if Section 5(b) authorized Proclamation 4074, the statute unconstitutionally delegates legislative authority. In *Federal Energy Administration* v. *Algonquin*

[8] Section 502(b) of the National Emergencies Act directs all appropriate Committees of Congress to "make a complete study and investigation" of the laws, including Section 5(b), exempted from the operations of that Act, and to make a report of their recommendations and proposed revisions to their respective Houses within a specified time. There is therefore no basis for petitioner's fears that the decision below "threaten[s] the very heart of constitutional government," "leaves the stage set for other unfettered presidential action," and "creates a vast potential for future abuse" (Pet. 10, 13, 18).

SNG, Inc., supra, this Court reaffirmed the proposition that a statute is not an unconstitutional delegation of legislative power if it contains an intelligible principle to which the President is directed to conform his exercise of the authority delegated (slip op. 10, citing *Hampton & Co.* v. *United States*, 276 U.S. 394, 409). Section 5(b) satisfies this standard. See *Veterans & Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs*, 459 F. 2d 676, 679 (C.A. 3), certiorari denied, 409 U.S. 933; *Sardino* v. *Federal Reserve Bank of New York*, 361 F. 2d 106, 110 (C.A. 2), certiorari denied, 385 U.S. 898.

The authority delegated by Section 5(b) is exercisable only in "time of war" or "any other period of national emergency declared by the President," limitations that "inherently preclude prior prescription of specific, detailed guidelines * * * [and] the otherwise oft provided requirement for prior hearings, extensive fact finding * * * and the like" (Pet. App. 33a-34a). In such circumstances the permissible scope of legislative delegation is necessarily somewhat broader than might be warranted in non-emergency times. Cf. *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 105; *Yakus* v. *United States*, 321 U.S. 414, 441; *Nielsen* v. *Secretary of the Treasury*, 424 F. 2d 833, 843 (C.A. D.C.).[9]

[9] Petitioner does not appear to dispute that Proclamation 4074 was limited in scope and duration and was reasonably related to the emergency declared. The court in *Yoshida* correctly held that the validity of an exercise of authority must be judged on the basis of the specific action taken, not, as petitioner's arguments suggest, on the basis of what actions might conceivably be taken in the future (Pet. App. 25a).

Moreover, Section 5(b) pertains only to foreign property. As this Court observed in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."

Finally, neither Section 5(b) nor Proclamation 4074 represents an abdication by Congress or a usurpation by the President of Congress' plenary power over foreign commerce. The court in *Yoshida* correctly noted that "[t]hroughout the 114 year life of the TWEA and its progenitors, Congress has repeatedly exercised its untrammeled plenary power over foreign commerce" (Pet. App. 36a). Moreover, the temporary import surcharges imposed by Proclamation 4074 were carefully fashioned so as not to exceed the import duties established by Congress. Since Proclamation 4074 was issued, Congress has continued to exercise its authority over tariffs and to supervise the authority that it has delegated to the President in times of national emergency. There is therefore no basis for petitioner's contention that the decision below authorizes executive intrusion into the powers of Congress under the Constitution.

4. Section 350(a)(6) of the Tariff Act of 1930, 19 U.S.C. 1351(a)(6), and Section 255(b) of the Trade Expansion Act of 1962, 19 U.S.C. 1885(b), both authorize the President to terminate, "in whole or in part," any rate of duty that he had previously proclaimed in order to implement a foreign trade agreement. ~~We disagree~~. In our view, those statutes also provided authority for Proclamation 4074. Since the surcharge imposed by Proclamation 4074 was limited to articles that had been the subject of prior tariff concessions and thereby of prior proclaimed rates of duty, Proclamation 4074 was valid as an exercise of the President's authority to terminate "in part" a proclaimed rate of duty.[10] The de-

[10] The Customs Court in *Yoshida* rejected this contention upon the basis that General Headnote 4(d) of the Tariff Schedules of the United States, 19 U.S.C. 1202(4)(d), provided that when a proclaimed rate is terminated, the rate shall revert, "unless otherwise provided," to the next intervening proclaimed rate which has not been terminated, or, if none, to the statutory rate. As the Customs Court interpreted it, the phrase "unless otherwise provided" merely served to authorize the President, when terminating a proclaimed rate, to specify that the new rate shall not be the next intervening proclaimed rate but some rate established in some other previous proclamation (Pet. App. 53a). The Court of Customs and Patent Appeals agreed with this position (Pet. App. 15a-16a).

There is no support for the position of the courts in *Yoshida* on this point. General Headnote 4(d) applies only in the situation where, after terminating a proclaimed rate, the President does not specify a new rate. In those circumstances, *i.e.*, where the new rate is not "otherwise provided" for by the President, that rate is established by General Headnote 4(d).

Similarly, the court's reliance on *United States* v. *American Bitumuls & Asphalt Co.*, 246 F. 2d 270 (C.C.P.A.), certiorari

cision of the court below, that that authority only authorizes the President entirely to replace existing rates with rates that have previously been proclaimed or prescribed by statutes, ignores, or renders meaningless, the statutory words "in whole *or in part*" (emphasis supplied).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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denied, 355 U.S. 883, is misplaced. There the court held only that the President's authority to terminate a rate was not limited by another statutory provision placing percentage limits on his authority to proclaim new rates. The court did not consider to what extent the President could terminate a rate "in part."

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